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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 432

GEORGE WILLIAM BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-5) is reported at 224 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1955 (Pet. App. 1). A petition for a rehearing was denied on September 3, 1955. The petition for a writ of certiorari was filed on September 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner caused a fraudulent check to be transported in interstate commerce.

2. Whether there was reversible error in the trial court's charge to the jury.

STATUTE INVOLVED

18 U.S.C. 2314 provides in relevant part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was tried with two other defendants under a two-count indictment charging the violation, and a conspiracy to violate, 18 U.S.C. 2314, in that they had caused to be transported in interstate commerce a falsely made, forged and counterfeited cashier's check (R. 1-5). The case was submitted to the jury only on count 2 charging the substantive offense (R. 128). Petitioner was found guilty and sentenced to imprisonment for seven years (R. 5-7). On appeal, the conviction was affirmed (Pet. App. 5).

At the trial, the Government relied in part upon the testimony of a fourth man, who had previously pleaded guilty to the charges (R. 10). It produced

evidence to show that in Dallas County, Texas, petitioner and his co-defendants concocted a plan to use a forged cashier's check to secure a large quantity of whiskey (R. 11). In furtherance of the plan the defendants had cashier's check forms printed on the "Tulsa [Oklahoma] Bank of Commerce," a nonexistent bank (R. 12-15, 33-37). They filled in one of these forms for the sum of $10,117.00, using a check protector obtained by petitioner (R. 31), and signed a fictitious name to represent the vice president of the nonexistent bank (R. 42, 26). They submitted this bogus check to a Dallas liquor dealer in supposed payment for a truck-load of whiskey (R. 46, 47). The liquor dealer deposited the check in his account in the Fair Park National Bank of Dallas, Texas (R. 47). That bank sent it in regular channels through the Republic National Bank of Dallas (R. 101, 105, 108) to the National Bank of Commerce at Tulsa, Oklahoma, where it was discovered that it was a false instrument (R. 115, 116).

Petitioner offered no evidence (R. 127). His motions to dismiss and for judgment of acquittal were denied (R. 127, 128).

The trial court, in instructing the jury, reviewed the count which it submitted (R. 128, 129) and charged with respect to proof of guilt as follows (R. 129):

> The * * * three defendants * * * have entered their pleas of not guilty which places the burden upon the government to prove

their guilt as charged in the indictment by competent evidence beyond a reasonable doubt.

A "reasonable doubt" is as the words import a doubt which is based upon reason. If when you come to consider the evidence of the entire case there arises in your mind an uncertainty as to the truth and the certainty or uncertainty of the matters submitted, such will be a reasonable doubt and you should give the defendant the benefit of it.

* * * * *

So now if you find and believe from the evidence submitted to you, beyond a reasonable doubt, that the said defendants did on or about the time stated in said indictment transport and cause to be transported such security as charged, then you will find the defendants guilty. If you have a reasonable doubt of such, you will find them not guilty.

The court further explained the question of federal jurisdiction, specifically charging the jury that it must find the defendants not guilty if it found that they did not transport, or cause to be transported, the check across the state line (R. 131). In this connection it pointed out that the defendants would not be guilty if it appeared that the liquor dealer or any of the banks forwarding the check across the state line knew that it was

fraudulent but continued its transportation (R. 131).

In instructing the jury with regard to the credibility of witnesses, the trial court identified the Government's witness who had previously pleaded guilty as an accomplice whose testimony should "be received with caution and weighed and scrutinized with care by the jury" (R. 130, 131).

ARGUMENT

1. Mistakenly relying upon *Kann* v. *United States,* 323 U. S. 88, and ignoring the squarely controlling decision in *United States* v. *Sheridan,* 329 U. S. 379, petitioner contends (Pet. 11-17) that he could not be convicted for causing interstate transportation of the forged check because, when the payee received credit for it, the bank became a holder in due course and forwarded the check, not as agent of the petitioner or the payee, but for its own purposes. Precisely this argument—that where the offense is causing the interstate transportation of a forged check, the transportation must be in aid of the fraud—was considered and rejected in *Sheridan.* There, as had been repeatedly emphasized in the *Kann* case itself (see 323 U. S. at 93, 94, 95), it was made clear that the result in the latter (reversal of a conviction under the mail fraud statute for failure to show that use of the mails furthered the fraudulent scheme) rested on the fact that the mail fraud statute prohibited the use of the mails "for the purpose of executing" a fraudulent scheme. Under the dif-

ferent statute involved in *Sheridan* and this case, this Court held, Congress intended to exclude forged securities, like stolen goods, from interstate transportation, and undertook not only to prevent frauds or the completion of frauds partially executed, but also to aid the states in detecting and punishing criminals who use the channels of interstate commerce to delay or defeat apprehension. See also *Pereira* v. *United States,* 347 U. S. 1.

Accordingly, it is clear in the present case that petitioner "caused" the unlawful transportation within the meaning of 18 U. S. C. 2314. Like the defendant in *Sheridan* (see 329 U. S. at 391), petitioner knew that the fraudulent check would cross state lines, since it was presented in Texas and had ostensibly been drawn on an out-of-state bank. See 18 U. S. C. 2; *Pereira* v. *United States, supra,* at 9; *Kann* v. *United States, supra,* at 93. Given these decisive facts, it makes no difference that petitioner and his accomplices had obtained the liquor they wanted with the forged check before the check was sent across the state line.

2. As to the trial court's charge to the jury (Pet. 6-11), the record shows that when petitioner was given the opportunity to object, he took no exception.[1] In any event, his present attempts to find error (Pet. 6-11) are without merit. There

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[1] Counsel for co-defendant made only the following exception (R. 132), which petitioner does not urge:

> The only one we have, we except to the action of the Court in failing to submit our charge on circumstantial evidence, being Charge Number One.

was no need to charge on what constituted a fraudulent security (Pet. 6-7), for there was no dispute that the check on a nonexistent bank was such a security. The judge did charge that, if the jury had a reasonable doubt as to petitioner's guilt, they should acquit (compare Statement, *supra*, p. 4, with Pet. 9). And the charge that Standish was an accomplice was obviously proper, since his own testimony showed him to be such. It is frivolous to argue, as petitioner does (Pet. 10-11), that this warning to treat accomplice testimony warily —a caution given for petitioner's protection—suggested the other defendants' guilt because "accomplice" necessarily implies other participants.

Since there was in the charge no error affecting substantial rights, the court below properly refused to consider on appeal the general criticism directed broadly at the charge as a whole. Rules 30 and 52(b), Federal Rules of Criminal Procedure.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 964919 939